In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1645

MICHAEL F. COIRO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, contends that his conduct in failing to appear to represent his client in a criminal case on two successive trial dates is insufficient to sustain his conviction for criminal contempt.

Petitioner was convicted of criminal contempt in the United States District Court for the Eastern District of New York for failure to appear for trial pursuant to two court orders, in violation of 18 U.S.C. 401. He was assessed costs of $1,000. The court of appeals affirmed (Pet. App.).

1. On May 2, 1974, petitioner undertook to represent Thomas De Simone in the United States District Court for the Eastern District of New York, for violations of 18 U.S.C. 549, 659 and 1951 (theft from interstate shipment). A first trial, from October 1 to October 3, 1974, ended in a mistrial because the jurors were un-

able to reach a verdict (A. 1-2).[1] On October 3, 1974, petitioner agreed to a new trial date of November 18, 1974 (A. 2, 9), which, two or three days later, with the consent of petitioner, was reset for November 25, 1974 (G. App. 5).

Five days before the agreed trial date, on November 20, 1974, petitioner contacted the presiding judge's chambers and requested a postponement of several weeks because he was representing a defendant in a trial in the New York State Supreme Court. This request was denied (A. 10). On November 25, 1974, the federal case was called for trial. Petitioner's client, Mr. De Simone, appeared; the prosecution appeared, ready to proceed; and a jury panel was made available. Petitioner failed to appear. Instead, his client presented an "affirmation" by petitioner advising that he was engaged in a trial in the New York State Supreme Court, and requesting adjournment to a later date (G. App. 10). Since Mr. De Simone was unrepresented, the trial was adjourned until December 2, 1974. The trial judge indicated that petitioner had disobeyed the court's order to appear (G. App. 7), and that this failure to appear would be taken up with the district court's Board of Judges (G. App. 8). The court notified petitioner of the new trial date by certified mail (A. 11), and the government did also (G. App. 14).

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[1]"A." refers to petitioner's appendix on appeal. "G. App." refers to the government's appendix on appeal, a copy of which has been lodged with this Court.

[2]The government also informed petitioner that sanctions would be imposed for his failure to appear on November 25 (G. App. 14).

On December 2, 1974, petitioner again failed to appear for trial. A second affirmation, dated November 29, but received by the court on the trial date, again recited that due to petitioner's state court engagement, he would be unable to appear for trial on December 2, 1974 (G. App. 11). Mr. De Simone's trial again had to be adjourned.

A week later the district court issued an order directing petitioner to show cause, on January 16, 1975, why he should not be held in contempt of court pursuant to 18 U.S.C. 401(3) and Rule 42(b), Fed. R. Crim. P. (A. 4-6).[3] At the January 16 hearing (A. 7-25) petitioner conceded that he had failed to appear for trial despite the court orders that he do so (A. 11). Petitioner explained that his contemporaneous state court engagement had prevented him from appearing for Mr. De Simone on the successive federal trial dates. The state court trial had begun on November 18, 1974, and the state court judge "ordered [him] to proceed" with the trial (A. 21).[4] Petitioner said that he did not inform the federal court until November 20, 1974, of his unavailability for trial because there were three plea negotiations in the state matter between November 18 and November 20: the state court judge and "the other counsel [all] thought that the case would ultimately be disposed of by way of a plea" (A. 12).

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[3]The show cause order recited that petitioner's failure to appear, as ordered, on November 25, 1974, and December 2, 1974, seriously interfered with the district court's proceedings "in that it was unable, due to [petitioner's] sudden and inexcusable failure to appear, to schedule another case for trial for the week of November 25, 1974, and also for the beginning of the week of December 2, 1974" (A. 5).

[4]At the show cause hearing petitioner informed the court that he apprised the state court judge of the federal engagement (A. 21). It is not evident when this notification to the state judge was made. Petitioner further indicated that the state judge made an unsuccessful effort to contact the federal court on the day after Thanksgiving (November 28, 1974).

The district court held petitioner in contempt. It emphasized that due to petitioner's conduct, it had twice been unable to proceed with Mr. De Simone's scheduled trial. The waste of time and resources showed "that the administration of justice is seriously interfered with" (A. 14). The court cautioned that when such problems arise "it is customary for counsel to indicate right away" that he will be unable to appear on the scheduled date, and not wait until the last minute to notify the court of the conflict (A. 14). The court thereupon imposed against petitioner one thousand dollars in costs, as an alternative to a fine for contempt (A. 20).

2. Petitioner contends that his conduct in disobeying two court orders to appear for trial does not constitute willful and reckless disregard of the authority of the court.

Pursuant to 18 U.S.C. 401(3), the district court has the power to punish such contempt of its authority as "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Petitioner violated two successive trial date orders and Local Rule 7, governing trial assignments. His conduct was more than sufficient to warrant imposition of sanctions for criminal contempt.

An attorney may be held guilty of criminal contempt for failure to appear at trial when his conduct subverts the orderly processes of the court[5] and thus obstructs the ad-

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[5]Notwithstanding the district court's characterization of the proceedings on the show cause order as a civil hearing (A. 9), the sanction imposed was in the nature of criminal contempt. The show cause order charged criminal conduct punishable under 18 U.S.C. 401(3) and Rule 42(b), Fed. R. Crim. P. (A. 6), and of controlling significance, the sanction was imposed to vindicate the authority of the court (A. 15). See *United States* v. *United Mine Workers of America*, 330 U.S. 258; *Nye* v. *United States*, 313 U.S. 33; *In re Osborne*, 344 F.2d 611 (C.A. 9). The fact that costs rather than a fine was imposed does not detract from the criminal character of the sanction. *Nye* v. *United States, supra*, 313 U.S. at 42.

ministration of justice, and reflects criminal intent. *In re Gates*, 478 F.2d 998 (C.A. D.C.). These elements must be established beyond a reasonable doubt. *United States* v. *Peterson*, 456 F.2d 1135, 1140 (C.A. 10). The requisite intent may be inferred when the attorney's conduct discloses a reckless and/or willful disregard for the court's orders or his professional duty. *Sykes* v. *United States*, 444 F.2d 928, 930 (C.A. D.C.); *In re Gates, supra*; cf. *In re Williams*, 509 F.2d 949, 960 (C.A. 2) (contempt for behavior obstructing administration of justice by a non-attorney).

The requirements of the orderly administration of justice, and of an attorney's duties to court and client, called for application of contempt sanctions to petitioner's conduct. His assertion that he was "impaled on the horns of a dilemma with an uncertain plan of resolution" (Pet. 6) is insufficient. Petitioner knew far in advance of the federal trial date that a possible conflict would arise.[6] His behavior in waiting almost to the last minute to notify the federal court of his state engagement discloses a reckless disregard of his professional duty, which alone warrants the inference of a willful and reckless disregard of the court's authority. It had serious consequences on the court's orderly processes, and petitioner does not deny that, as both the district court and the court of appeals concluded, the administration of justice was seriously obstructed.

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[6]The district court emphasized that petitioner's failure to appear, as ordered, on November 25, 1974, a date agreed upon by him, and December 2, 1974, resulted in his inability to perform his duties under the Individual Assignment Calendar of the district court (A. 14-15). The net result of petitioner's deliberate failure to appear was made unmistakably clear to him at the hearing (A. 13):

> [T]his Court is placed in a position where [it] cannot proceed and a considerable amount of time is lost because one cannot call up the last minute and bring in a jury or other lawyers to try a case which is not set down for trial.

This is not a case like *Sykes* v. *United States, supra*, 444 F.2d at 930, in which the requisite intent was lacking because the attorney's failure to appear resulted from a lapse of memory, preoccupation with another case, and confusion as to dates. On the contrary, petitioner was acutely aware of the scheduled dates for his appearances in federal court. Moreover, there is a substantial difference between the eight minutes of tardiness in returning to a trial involved in *In re Farquhar*, 492 F.2d 561 (C.A. D.C.), on which petitioner relies (Pet. 8), and his two successive failures to appear for trial.

Even though Mr. De Simone's second trial had been scheduled with petitioner's consent before the state court proceeding was set,[7] petitioner assumed that the federal court could easily adjourn matters for his convenience, if he simply did not show up. Such conduct was both willful and intolerable to the efficient administration of the federal courts. See *In re Niblack*, 476 F.2d 930 (C.A. D.C.), certiorari denied, 414 U.S. 909. The relatively mild disciplinary sanction imposed in this case may result in encouraging attorneys in the Eastern District of New York to attend more closely to their professional obligations concerning the scheduling of trials.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[7]Petitioner conceded on oral argument in the court of appeals that he knew as early as November 4, 1974, that trial on the state cause would commence on November 18, 1974. Further, at the show cause hearing petitioner unequivocally agreed with the trial judge's observation that "As a matter of fact, as I understand the statement you made to me the other day, this second case in Queens County [New York], arose after you had already been ordered by this Court, to be ready on November 25" (A. 10).